[* 1]
SCANNED ON 3/26/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART _____
Justice

Olshewitz

- v -

City of New York, et al

INDEX NO. 110025/04

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/19/08

LOUIS B. YORK J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------x

HOWARD OLSHEWITZ, Index No.: 110025/04

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK TRANSIT AUTHORITY and SLATTERY SKANSKA, INC.,

Defendants.

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SLATTERY SKANSKA, INC., Index No.: 590064/05

Third-Party Plaintiff,

-against-

WELSBACH ELECTRIC CORPORATION,

Third-Party Defendant.

----------x

York, J.:

Motion sequences numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages sustained by an electrician when he fell into an open excavation pit while working at a construction site adjacent to the northbound lanes of the FDR Drive at East 62nd Street in New York, New York on November 5, 2003.

In motion sequence number 002, plaintiff Howard Olshewitz moves, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims against defendants City of New York, New York Transit Authority and Slattery Skanska, Inc. (collectively, defendants).

In motion sequence number 003, defendants move, pursuant to CPLR 3212, for partial

summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against them.

BACKGROUND

On the day of his accident, plaintiff, who was employed as an electrician by third-party defendant Welsbach Electric Corporation (Welsbach), was involved in the FDR roadway construction project. At the time of his accident, while standing on ground level and straddling a manhole, plaintiff attempted to remove the manhole cover with a manhole hook so that he could cut a cable located beneath the pavement. The manhole cover, which was even with the existing roadway, was located within two feet of an open excavation pit.

When the manhole hook slipped, plaintiff was caused to lose his balance and fall backwards into the excavation pit, sustaining injuries. Specifically, plaintiff explained that, as he stood over the manhole cover, he "inserted the hook, the tip of the hook into the little slot on the cover, attempted to lift the cover and fell backwards into the hole" (Defendants' Notice of Motion, Exhibit D, Olshewitz Deposition, at 24). Plaintiff noted that the manhole cover had only two little slots toward the center of the cover, and thus, it was not "your typical manhole cover that you will see on the streets" (id.). In addition, plaintiff stated that, although there were some barricades around the excavation pit that he noticed as he approached the manhole, the barricades did not surround the entire pit.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept

2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

LABOR LAW § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting ... shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003];

Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, it should be noted that, as a highway may not constitute a "building or structure" within the purview of Labor Law § 240 (1), "that section imposes no duty upon the owner of a highway under construction or repair" (Spears v State of New York, 266 AD2d 898, 898-899 [4th Dept 1999]; Dilluvio v City of New York, 264 AD2d 115, 121 [1st Dept] affd 95 NY2d 928 [2000] [repaving a portion of a parkway at grade does not constitute work on a structure for purposes of Labor Law § 240 (1)]; Sciora v New York State Department of Transportation, 226 AD2d 621, 621 [2d Dept 1996]; Matter of Dillon v State of New York, 201 AD2d 793, 793 [3d Dept 1994]; Siragusa v State of New York, 117 Ad2d 986, 987 [4th Dept 1986] ["contour of the highway cannot be equated with an elevated work platform or structure within the contemplation of the statute"]).

In addition, the facts of this case do not trigger the provisions of Labor Law § 240 (1), as the work site in question was on the ground, although located next to an excavation pit (see Caradori v Med Inn Centers of America, LLC, 5 AD3d 1063, 1064 [4th Dept 2004] [no Labor Law § 240 (1) liability where plaintiff, who was working at ground level, was injured when she fell into a three-foot-deep trench]; Panepinto v L.T.V. Steel Company, Inc., 207 AD2d 1006, 1006 [4th Dept 1994] [Court held that plaintiff's task did not expose plaintiff to "'the type of hazard that the use or placement of the safety devices enumerated in Labor Law § 240 (1) was designed to protect against'"where plaintiff, while working at ground level, was injured when he fell into a hole at a work site (citation omitted)]; Kimball v Fort Ticonderoga Association, Inc., 167 AD2d 581, 582 [3d Dept 1990] [where the worksite in question was on the ground,

plaintiff's fall into an adjacent excavation was considered not within the contemplation of Labor Law § 240 (1)].

Thus, plaintiff is not entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim against defendants. Defendants are entitled to partial summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them.

LABOR LAW § 241 (6) CLAIM

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Although plaintiff alleges violations of Industrial Code 12 NYCRR 23-1.21, 23-1.30, 23-1.7 and 23-1.7 (b) (1) in his bill of particulars, with the exception of Industrial Code 12 NYCRR

23-1.7 (b) (1), plaintiff failed to address those Industrial Code violations in his moving papers. Thus, this court deems those parts of plaintiff's Labor Law § 241 (6) claim predicated on those violations of the Industrial Code not mentioned by plaintiff as abandoned, and plaintiff is not entitled to partial summary judgment on those alleged Industrial Code violations (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). Accordingly, defendants are entitled to partial summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.21, 23-1.30 and 23-1.7, with the exception of 23-1.7 (b) (1).

Industrial Code 23-1.7 (b) (1), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by safety railing, is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (Olsen v James Miller Marine Service, Inc., 16 AD3d 169, 171 [1st Dept 2005]).

Here, plaintiff is entitled to partial summary judgment in his favor on that part of his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 23-1.7 (b) (1), due to the fact that the excavation pit at issue was not sufficiently guarded, so as to prevent plaintiff from falling into it. As such, defendants are not entitled to partial summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) against them.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or

general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Although defendants in this case argue at length the issue of supervision, or lack thereof, on the part of defendants, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. Here, a review of the record reveals that plaintiff's accident was caused by an unsafe condition which was created by an open and inadequately guarded excavation pit.

In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (see Keating v Nanuet Board of Education, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but, rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; Thomas v Claffee, 24 AD3d 749, 751 [2d Dept 2005]; Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known

to contractor, rather than the method of plaintiff's work]).

Here, defendants have not put forth any argument or submitted any evidence whatsoever to demonstrate that they did not create or have actual or constructive notice of the unsafe condition at issue. Thus, a question of fact exists as to whether defendants created or had actual or constructive notice of said unsafe condition. As defendants have not met their burden for summary judgment, defendants are not entitled to partial summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it hereby

ORDERED that those parts of plaintiff Howard Olshewitz's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim, as well as his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.21, 23-1.30 and 23-1.7, with the exception of 1.7 (b) (1), against defendants City of New York, New York Transit Authority and Slattery Skanska, Inc. (collectively, defendants) are denied; and it is further

ORDERED that the part of plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) is granted; and it is further

ORDERED that those parts of defendants' motion, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, as well as his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.21, 23-1.30 and 23-1.7, with the exception of 1.7 (b) (1), against them is granted, and those parts of plaintiff's

complaint are severed and dismissed; and it is further

ORDERED that those parts of defendants' motion, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) against them are denied; and it is further

ORDERED that the remainder of the action continue.

DATED: 3/19/08

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.